IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 93 OF 2002

Smt. Sunita Umakant
Vadenkar alias Sunita
Wadekar, wife of
Shri Umakant Mahadev
Vadenkar, major, married,
housewife, presently
permanently residing at
C/o. Shri Digambar Atmaram
Metha, FDlat No.4, First
Floor, Vasco Towers,
Vasco-da-Gama, Goa 403 802. ... Applicant.

versus

1. The State,
   represented by Public
   Prosecutor.

2. Shri Mahadev Uma Vadenkar
   alias Mahadev Uma Wadekar,
   major, married, businessman,
   House No.36, Tariwaddo,
   Betul, Salcete, Goa 403 603.

3. Smt.Parvati Mahadev
   Vadenkar alias Parvati
   Mahadev Wadekar, major,
   married, business person,
   House No.36, Tariwaddo,
   Betul, Salcete, Goa 403 603.

4. Smt.Maya Anand Naik,
   wife of Shri.Anand Naik,
   (daughter of Shri Mahadev
   Uma Vadenkar), major,
   married, service, presently
   residing at C/o.Shankar Kumtekar,
   Behind Betul Beach Resort,
   Betul, Salcete, Goa 403 603.

5. Shri Anand Naik,
(son-in-law of Shri Mahadev
Uma Vadenkar), major,
married, service, presently
residing at C/o.Shankar Kumtekar,
Behind Betul Beach Resort,
Betul, Salcete, Goa 403 603.

6. Smt. Jyoti Tukaram Pednekar,
wife of Shri Tukaram V.
Pednekar(daughter of Shri
Mahadev Uma Vadenkar), major,
married, housewife, r/o
Tariwaddo, Colvale, Bardez,
Goa.

7. Shri Tukaram Vasudev Pednekar,
(son-in-law of Shri Mahadev
Uma Vadenkar), major, married,
businessman, r/o Tariwaddo,
Colvale, Bardez, Goa.

8. Smt. Jyoti Vithoba Ganba
alias Jyoti Vithoba Sadye, wife
of Shri Vithoba S. Ganba alias
Vithoba S. Sadye(daughter of
Shri.Mahadev Uma Vadenkar),
major, married, housewife,
r/o Naikwada, Gotnibag, Karwar,
Karnataka.

9. Shri Vithoba Sudama Ganba
alias Vithoba Sudama Sadye,
(son-in-law of Shri Mahadev
Uma Vadenkar), major, married,
businessman, r/o. Naikwada,
Gotnibag, Majali, Karwar,
Karnataka.

10. Smt. Sitabai Sudama Ganba
alias Sitabai Sudama Sadye,
wife of Shri Sudana Ganba
Sadye(sister of Shri
Mahadev Uma Vadenkar,
major, married, housewife,
r/o Naikwada, Gotnibag,
Majali, Karwar, Karnataka.

11. Shri Chandrakant Kurle,
major, married, businessman,
r/o. Dubansi Bunder,
Gokarna, Karwar, karnataka.

12. Smt. Vatsala Chandrakant Kurle, wife of Chandrakant Kurle, major, married, housewife, r/o Dubansi Bunder, Gokarna, Karwar, Karnataka. ... Respondents.

Mr. Arun Bras De Sa, Advocate for the Applicant.

Mr. S. N. Sardessai, Public Prosecutor for Respondent No.1.

Mr. J. P. D'Souza, Advocate for Respondent Nos.2 to 12.

CORAM: P. V. HARDAS, J.

DATED: 18TH JULY, 2003.

ORAL JUDGMENT

This application under Section 482 of the Code of Criminal Procedure is filed by the Applicant/Original Complainant, challenging the Judgment of the learned District & Sessions Judge, Margao, dated 23rd January, 2002, in Criminal Revision Application No.50/2001 confirming the Order of the learned Judicial Magistrate, First Class, Vasco-da-Gama, dated 18th June, 2001, recalling the process issued against the Original Accused Nos.2 to 12, who are Respondent Nos.2 to 12 in the present matter.

2. The facts as are necessary for the decision of this Criminal Miscellaneous Application are set out hereunder:-

The Applicant/Original Complainant filed Criminal Case No.50/P/1998/D in the Court of the learned Judicial Magistrate, First Class, Vasco-da-Gama for an offence against the Applicants/Original Accused Nos.1 to 13, for an offence punishable under Sections 494, 109, 114 and 120-B of the Indian Penal Code. The Applicant was married to the Original Accused No.1 on 21st March, 1994 and their marriage was solemnised according to Vedic rites on 1st April, 1994. In the complaint, it was stated that the husband of the Complainant/Original Accused No.1 had confessed to one Dashrath Juvekar that he had performed a second marriage with Original Accused No.13. Original Accused No.1 is alleged to have further confessed to Dashrath Juvekar that he had married Original Accused No.13 on 24th November, 1997 as per the Hindu religious rites by taking seven rounds around the sacred fire presided over by a local priest. Original Accused No.1 has further alleged to have confessed that he was encouraged to get married for the second time by the present Respondent Nos.2 to 14 and others.

3. The said Dashrath Juvekar was examined by the Complainant as P.W.3 before the learned Judicial Magistrate, First Class at Vasco-da-Gama. The learned Judicial Magistrate, First Class at Vasco-da-Gama by his Order dated 28th April, 1999 issued process against

Accused No.1 for an offence punishable under Section 494 of the Indian Penal Code and against Accused Nos.2 to 13 punishable under Sections 107 and 114 of the Indian Penal Code. The present Respondents/Accused Nos.2 to 12 filed applications for recalling of the process. The learned Judicial Magistrate, First Class at Vasco-da-Gama by Order dated 18th June, 2001, recalled the process issued against the present Respondent Nos.2 to 12/Original Acxcused Nos.2 to 12. The learned Judicial Magistrate, First Class at Vasco-da-Gama accepted the evidence of P.W.3, Dashrath Juvekar, in so far upholding the Order of issuing of process of Original Accused No.1. In relation to the material against Accused Nos.2 to 12, the learned Trial Court came to the conclusion that the evidence against them was of hearsay nature as the other Accused had not confessed to P.W.3, Dashrath Juvekar, but only Original Accused No.1 had confessed. The learned Trial Judge also held that the confession of Accused No.1 cannot bind the other Accused and, therefore, could not be considered at that stage. The learned Trial Court, therefore, came to the conclusion that there was no evidence of abatement and, therefore, recalled the process. The Complainant aggrieved by the Order of the learned Trial Court in recalling the process of Respondent Nos.2 to 12 filed Criminal Revision Application No.50/2001 before the learned Sessions

Judge at Margao, which Order is impugned in the present application.

4. The learned Sessions Judge, while dismissing the revision filed by the present Applicant upheld the Order passed by the learned Trial Court recalling the process against Respondent Nos.2 to 12. The learned revisional Court proceeded to examine the alleged extra judicial confession of Accused No.1 which was made to P.W.3, Dashrath Juvekar, in so far as it implicates the Respondent Nos.2 to 12. The learned revisional Court then examined certain authorities of the Apex Court with regard to the sufficiency of the evidence for sustaining a conviction for an offence punishable under Section 494 of the Indian Penal Code. The learned revisional Court also referred to a Judgment of the Apex Court which held that extra judicial confession is a weak piece of evidence which cannot be used to convict the co-accused unless the extra judicial confession was corroborated by some other evidence. The learned revisional Court then examined the alleged extra judicial confession and came to the conclusion that the words used therein did not amount to instigating Accused No.1 to commit the offence.

5. The Court while considering the question of recall of the process has only to examinne the material

on record from the point of view of finding out the existence of a prima facie case. The Court should not undertake an exercise of meticulous examining the material as regards the sufficiency or otherwise for convicting the Accused. Such an exercise is wholly impermissible. Whether the extra judicial confession was by itself sufficient for warranting conviction is not a matter which can be examined by the Court while deciding the application for recalling the process. This has to be left to be adjudicated or decided upon by the Court after the parties have led their evidence. In the face of the extra judicial confession, therefore, it cannot be said that prima facie there is no material implicating Respondent Nos.2 to 12. P.W.3, Dashrath Juvekar, has stated that the Accused No.1 had confessed that Original Accused Nos.2 to 12 and others had encourged Accused No.1 to commit an offence punishable under Section 494 of the Indian Penal Code. The Complainant had cited other witnesses in the complaint who were yet to be examined. The question whether the word "encouraged" would not fall within the sweep of Section 107 of the Indian Penal Code is not a matter which can be adjudicated upon at this stage when the Court is concerned with finding out whether there is prima facie case. Therefore, both the Courts below were not correct in quashing the process which was issued against Original Accused Nos.2 to 12 since some

prima facie material exists warranting issuance of process. The adequacy or otherwise of the material to convict is a matter which can be dealt with by the Court after the evidence of the parties is recorded or if after all the witnesses are examined by the Complainant the Court finds that there is no material to frame a charge, the Court can discharge the Accused under Section 244 of the Code of Criminal Procedure. At this stage, therefore, there does exists some material warranting the issuing of process to Respondent Nos.2 to 12/Original Accused Nos.2 to 12. The Orders of the two Courts below recalling the process against Respondent Nos.2 to 12 is wholly unsustainable and deserves to be quashed and set aside.

6. Criminal Miscellaneous Application No.93 of 2002 is allowed. The Orders impugned of the two Courts below are hereby quashed and set aside. There shall, however, be no order as to costs.

7. Records and Proceedings be remitted back to the learned Trial Court.

P. V. HARDAS, J.

RD.